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No. 630

Supreme Court of the United States

October Term, 1945

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 630

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS LEE CAUSBY AND WIFE, TINIE CAUSBY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case on June 4, 1945, by the Court of Claims.

OPINION BELOW

The opinions of the Court of Claims (R. 11-22) are reported in 60 F. Supp. 751.

JURISDICTION

The judgment of the Court of Claims sought to be reviewed was entered on June 4, 1945 (R. 22). A motion by the United States for a new trial was denied on October 1, 1945 (R. 22). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. sec. 288 (b).

QUESTIONS PRESENTED

Effective June 1, 1942, the United States leased the Greensboro-High Point, North Carolina, Airport for one year with a right to renew until June 30, 1967, or six months after the end of the present national emergency, whichever should first occur. The lease gave the Government the right to use the airport for requirements of the War Department concurrently with the lessor and its tenants. The plaintiffs in the Court of Claims owned a parcel of land on which they lived and operated a chicken business, some 2,200 feet from the airport. Upon these facts the following questions are presented:

1. Whether the flight of aircraft over plaintiffs' land at a minimum elevation of 83 feet constituted a taking for which recovery may be had under the Tucker Act.

2. If so, whether the effect of the noise and lights of aircraft crossing above the land and the landowner's knowledge that airplane accidents have taken place at or in the vicinity of the airport may be considered in determining compensation to be paid for such taking.

3. Whether the Court of Claims erred in failing to specify what property interest was taken and whether such interest was permanent or temporary.

4. Whether the ultimate conclusion determining compensation to be $2,000 is supported by evidentiary findings and by substantial evidence.

STATEMENT

This action was brought by Thomas Causby and his wife to recover $7,035 for the alleged taking of plaintiffs' lands and for damages to their poultry business which was alleged to have resulted from the flight of War Department aircraft over plaintiffs' lands. The facts and the proceedings in the court below may be summarized as follows:

Since 1927 or 1928 there has been an airfield some eight miles from Greensboro, North Carolina (R. 5). During 1939, extensions were made to one or both of the runways of the airfield which run from northeast to southwest and from northwest to southeast and are 4,000 feet and 3,370 feet long, respectively (R. 5–6). In April 1942 the Greensboro-High Point Municipal Airport Authority, which now operates the airport, was activated pursuant to North Carolina statute (R. 5). On May 11, 1942, the Authority executed a lease to the United States for a term ending June 30, 1942, with a provision for renewals until June 30, 1967, or six months after the end of the present national emergency, whichever should first occur (R. 6). The lease gave the United States the right to use the airport "concurrently, jointly and in common with the Lessor and its tenants" (R. 218).

In 1934 the Causbys purchased 2.8 acres in a strip 100 feet wide and 1,200 feet long (R. 4–5). In 1937 improvements were completed consisting

of a six-room dwelling and various outbuildings principally used for a chicken farm (R. 4). The path of glide to the northwest-southeast runway passes directly over the Causby property, the end of the paved runway being 2,220 feet from their barn and 2,275 feet from their house (R. 8). Between the airfield and the Causby property is a 38.04 acre tract owned by the Government and three privately owned tracts comprising 74.62 acres (R. 6–7). The 30 to 1 safe glide angle approved by the Civil Aeronautics Authority passes over the Causby property at a minimum elevation of 83 feet, which is 67 feet above the dwelling, 63 feet above the barn and 18 feet above the highest tree (R. 8).[1]

Plaintiffs and their witnesses testified that while the civilian planes using the airport bothered them somewhat, use of the airport by the Army, particularly by heavy bombers, interfered with their sleep, etc., because of the noise and lights (R. 34–37, 52–53). Plaintiffs claimed that because of the effect of the noise and lights on the chickens, they were forced to go out of the poultry business (R. 38). They also claimed that uneasiness was produced from fear of accidents (R. 39–40, 46–

[1] The court below described the 30 to 1 glide angle as follows (R. 12):

> This means that there must be no obstruction more than a foot high 30 feet from the end of the runway, and that the height of any obstruction must not exceed 1/30 of its distance from the end of the runway. This angle of glide is supposed to be safe under the worst conditions.

47, 59). Plaintiffs claimed their property was uninhabitable but admitted that, except for a two-month period, they continued to live there (R. 41, 48, 55). The only evidence of value or damages presented by plaintiffs was that the fee value of the property was about $4,700 (R. 25–26, 31–32) and Causby's testimony that the fair value of the loss of the chicken business was $1,000 (R. 38). At least one of plaintiffs' experts admitted the land had incresed in value by reason of the airport (R. 30).

The Government introduced evidence that the runway near plaintiffs' property was used only 4% of the time in taking off and 7% in landing (R. 7, 204–208). It also introduced data showing that all military traffic at the airfield represented about ⅓ or less of all traffic at the airfield and that heavy four-motor bombers constituted only 10% of all military traffic (R. 7–8, 204–208). The details of four airplane accidents were given, from which it appeared that two fatal crashes had occurred one mile and two and one-half miles from the Causby property, respectively. The other two accidents were at the airport and consisted of a landing with the plane's wheels up and of an abortive take-off which did no damage either to the plane or to other property. (R. 9, 209–213.) These facts were incorporated by the court in its findings. In addition, Government experts valued plaintiffs' property between $2,500 and $2,885 (R. 81, 96–98, 113–114) and testified that the airport

hazard did not substantially affect the market value (R. 89, 101).

After finding the facts above outlined as to location of the property, the history of the airport, and the use made of it by Army aircraft, the Court of Claims found (Findings 11–12; R. 9–10):

> Since the United States began operations about May 1942, its four-motored heavy Army and Navy bombers, the fighter and certain other planes of the heavier type, in taking off from and landing at this airport, have frequently passed over plaintiffs' property, their house, and chicken houses both day and night and, at times, in considerable numbers rather close together. They come close enough at times to appear to barely miss the tops of trees on the property and at times close enough to the tops of the trees to cause the old leaves on the trees to fly off. The noise so close to the buildings is startling and at night the glare from the planes brightly lights up the immediate area.
>
> The planes became more numerous after the Army began its operations and this situation has been continuous since that date. There is no evidence of an intention to use or of an intention not to use the airport for its heavy bombers after the termination of defendant's lease, other than the fact that defendant has the right to renew its lease only until six months after the end of the

present emergency or until June 30, 1967, whichever date is the earlier.

12. The result of this situation, together with knowledge of the accidents that have occurred, is that the plaintiffs and their family have become nervous and frightened. At night they are frequently deprived of sleep. The peace and comfort of their home are seriously interfered with. Their property, for the same reason, has depreciated in value.

After describing the effect of the planes upon the chickens, the court found (Findings 13–14; R. 10–11):

Plaintiffs finding themselves losing money gave up the chicken business. Chickens that had cost approximately $2.50 each to hatch and raise for production purposes were sold on the market for $1.50 each. This situation had destroyed the use of the property as a commercial chicken farm.

14. The value of plaintiffs' property that was destroyed and the value of the easement taken, together with the damage to the remainder of plaintiffs' property as a result of the taking of the easement, is $2,000.00.

The opinion of the court below stated that a property owner may prohibit any use of the air space above his land "that interferes with his right to light, air, view, or the safe and peaceful occupation and enjoyment of his land" (R. 14).

It held that the instant case is controlled by *Portsmouth Harbor Land & Hotel Co.* v. *United States,* 260 U. S. 327. It further held that the right to fly over the property at the stated heights had been taken permanently, not temporarily. (R. 17.) While recognizing that plaintiffs were not entitled to recover the damage to their business, the court concluded (R. 18):

> From all the testimony, we have concluded that the value of the property destroyed and of the easement taken and the damage to plaintiffs' property resulting from the taking of this easement is the sum of $2,000.00. A judgment in the nature of a jury verdict will be rendered for this amount.

Judge Madden dissented on three grounds. First, he took the view that there was no basis for the assumption that the Government's activities at the airport would be carried on permanently. Second, he expressed the opinion that the Government had the right, at least in wartime, to fly its planes through the air space over an owner's lands when the flights are at a safe altitude and no more frequent than in this case. Finally, he thought that, assuming that what the Government did was a legal wrong, there was no taking of plaintiffs' property.

On October 1, 1945, the Court denied the Government's motion for a new trial but added to Finding 14 (*supra,* p. 7) the statement (R. 22):

The date of the taking of the easement was June 1, 1942.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that property had been taken from the plaintiffs.

2. In holding that the damages caused by the noise of aircraft could be considered in determining compensation.

3. In holding that the damages resulting from lights of aircraft could be considered in determining compensation.

4. In holding that the damages claimed to have resulted from fear of aircraft accidents could be considered in determining compensation and in failing to find whether such fear was shared by the public generally, whether it was reasonable and whether it affected market value.

5. In failing to define what property interest was taken.

6. In failing to find whether such interest was permanent or temporary.

7. In concluding that a permanent interest had been taken, in the absence of evidence to support such a conclusion.

8. In finding and concluding that compensation should be $2,000, in the absence of evidentiary findings and evidence to support such conclusion.

9. In awarding the value of property "de-

stroyed" without any finding that any property was destroyed.

10. In entering judgment against the United States.

REASONS FOR GRANTING THE WRIT

The minimum angle of glide for aircraft passes over the Causby property at an elevation of 83 feet (R. 8). There has been no interference with any present or potential use of the air space located above that height. The court below recognized that the old common law view that the landowner owns to the sky has been abandoned. However, the majority of the court below declared that a landowner may prohibit any use of air space which "interferes with his right to light, air, view or the safe and peaceful occupation and enjoyment of his land" (R. 14). The dissenting judge thought that the Government has a right to fly its planes through the air space when there is no danger of physical contact with the landowner's property.

The court below concluded that flying through the air space was a trespass and that assertion of the right to do so constituted the taking of an easement. Having reached this conclusion, the recovery of the damages resulting from noise, lights, and fear of accidents was justified on the theory that when a portion of a single unit of property is taken, "it is well settled that a plaintiff may recover not only the value of the part of

his land which has been taken, but also the damage to the remainder resulting from the taking of a part of it" (R. 16). Thus, the court held here that a landowner "owns the air space above his land as completely as he does the land itself or the minerals beneath it, at least insofar as it is necessary for his full and complete enjoyment of the land itself" (R. 14).

1. The decision is in conflict with that in *Hinman* v. *Pacific Air Transport*, 84 F. 2d 755, certiorari denied, 300 U. S. 654, in which the Circuit Court of Appeals for the Ninth Circuit held that flying through air space within 100 feet or even 5 feet of the surface was not a technical trespass upon the property of the landowner but rather that the landowner's only right was to prevent an actual interference to his possession or his beneficial use of the land. The court was of the view that it is not legally possible to obtain an easement by prescription through air space. See also *Smith* v. *New England Aircraft Co.*, 270 Mass. 511; *Delta Air Corporation* v. *Kersey*, 193 Ga. 862; Note, 7 Journal of Air Law, 624. As Mr. Justice Jackson stated in his concurring opinion in *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, 302–303:

> The ancient idea that landlordism and sovereignty extend from the center of the world to the periphery of the universe has been modified. Today the landowner no more possesses a vertical control of all the

air above him than a shore owner possesses horizontal control of all the sea before him. The air is too precious as an open highway to permit it to be "owned" to the exclusion or embarrassment of air navigation by surface landlords who could put it to little real use.

The decision in *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327, is not, as the court below thought (R. 14–16), controlling here. The right to use air space for planes and similar purposes without any physical interference with surface uses was not involved nor was it discussed in the opinion. The allegations of the complaint in that case, which were held to be sufficient, claimed that there had been a taking of the land. The Court applied (260 U. S. at p. 329) the principles established in the predecessor case of *Peabody* v. *United States*, 231 U. S. 530. There the Court cited only the decisions in *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, *United States* v. *Lynah*, 188 U. S. 445, and *United States* v. *Welch*, 217 U. S. 333, to support the proposition that subjection of land in time of peace to the burden of governmental use by firing projectiles at will over it might well be considered to be a taking (231 U. S. at p. 538). Thus, the *Portsmouth* case was simply another application of the view established in the *Pumpelly, Lynah* and *Welch* cases, in all of which the plaintiffs' lands had been permanently flooded,

that the destruction of all uses for property constituted a taking. This was obviously based upon the danger that rather than passing over the claimant's land the projectiles would land upon it. No such case is presented here because the minimum height of flight over the Causby property is 83 feet and the claim to a substantial award here is based not upon any physical interference with the plaintiffs' property but upon noise, the glare from lights, and the fear of accidents.

The court below assumed its conclusion when it stated that a landowner had a right to the "peaceful occupation and enjoyment of his land" (R. 14). The very decisions cited by the court show that the owner does not have a right to prohibit the noise incidental to activities otherwise legal. Thus, in *Delta Air Corporation* v. *Kersey*, 193 Ga. 862, the court held that an abutting property owner could not complain of noise and dust which is simply an incident to ordinary use of the airport. In *Smith* v. *New England Aircraft Co.*, 270 Mass. 511, the court referred to many instances where the effect of noise, smoke, etc., must be borne by the property owner. As Judge Madden pointed out (R. 19–20), the many decisions which deny individuals the recovery of damages which result from noise, vibrations and the like, incidental to the operation of railroads are apt analogies here. *Richards* v. *Washington Terminal Co.*, 233 U. S. 546; see 1 Nichols,

Eminent Domain (2d ed. 1917) sec. 114, pp. 317–318, and cases there cited. Clearly, a distinction cannot be based upon the fact that the noise here was made in the air space above the Causby property rather than on or over abutting property. In fact, plaintiffs did not complain of the smaller aircraft which fly through the same air space but only of the increased noise caused by heavy bombers. That noise would be largely the same if, rather than flying over the Causby strip, which is only 100 feet wide, the planes were flying over neighboring land.

2. Even if the plaintiffs owned the air space above their land, there has not been a taking which would justify the award of substantial damages under the Tucker Act. The physical use of the air space was, at most, merely a theoretical taking which did not involve damage. Cf. *Marion &c. Ry.* v. *United States*, 270 U. S. 280. It is the noise, the lights of the planes and the fear of accidents upon which the claim is based. These factors constituted simply consequential damage and not a taking. *Bedford* v.

In addition to damages from noise and lights, consideration was given to plaintiffs' alleged fear of accidents (Finding 12; R. 10). The Court of Claims made no finding that there was actually a probability of damage to plaintiffs' property from accidents or even that there was a reasonable public apprehension thereof which would depreciate market value. Such a fear on the part of plaintiffs is too speculative and conjectural to be considered in awarding compensation. *Miller* v. *United States*, 137 F. 2d 592 (C. C. A. 3); *Meriden* v. *Zwalniski*, 88 Conn. 427, 433–434.

United States, 192 U. S. 217; *Manigault* v. *Springs*, 199 U. S. 473; *Jackson* v. *United States*, 230 U. S. 1; *Hughes* v. *United States*, 230 U. S. 24; *Cubbins* v. *Mississippi River Comm'n.*, 241 U. S. 351; *Sanguinetti* v. *United States*, 264 U. S. 146. The mere fact that some property interest has been taken does not render compensable what would otherwise constitute consequential damage. In *United States* v. *Willow River Power Co.*, 324 U. S. 499, 501, nominal damage was done "to land as land or to structures as such" but that did not authorize recovery of power value. Cf. *Danforth* v. *United States*, 308 U. S. 271, 286; *Court of Marion County, W. Va.* v. *United States*, 53 C. Cls. 120; *United States* v. *Meyer*, 113 F. 2d 387 (C. C. A. 7). The decision in *United States* v. *Grizzard*, 219 U. S. 180, relied upon by the court below (R. 16), is not to the contrary. That case simply held that when the taking of a portion of a tract of land rendered access to the remainder less convenient the resulting depreciation in value to the remainder was compensable.

The claim for damage resulting from noise, lights and fear of accidents would seem to constitute a claim sounding in tort, of which the Court of Claims does not have jurisdiction. Cf. *Sanguinetti* v. *United States*, 264 U. S. 146; 3 Comp. Gen. 234. The liability, if any, of private persons under the circumstances of this case would be in tort for the maintenance of a nuisance. Cf. *Delta Air Corporation* v. *Kersey*, 193 Ga. 862;

Smith v. *New England Aircraft Co.*, 270 Mass. 511. Any such liability of the United States must rest on special Acts of Congress or on general legislation, not presently existing, dealing with these problems.

3. The court made no attempt to specify what property interest had been taken except to refer to an "easement". No attempt was made to define either a minimum permissible altitude of flight, the type of aircraft which might be flown over the land, or the frequency of flight. Clearly, a finding as to what property interest was taken is essential both for the purpose of valuing that interest and for the purpose of defining the rights which the Government would acquire upon payment of the judgment. The absence of this essential finding is not only itself reversible error (*United States* v. *Seminole Nation*, 299 U. S. 417, 422; *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205) but also exemplifies the inappropriateness of Tucker Act litigation for the resolution of the conflicting interests involved in air navigation.

The court below likewise failed to make any finding whether a permanent easement was taken or only an easement to use the land temporarily. The majority opinion states (R. 17) that the United States "appropriated this easement unto itself permanently, not temporarily". But the absence of an essential finding cannot be cured by statements in the opinion. *United States* v. *Seminole Nation*, 299 U. S. 417, 422; *United States* v.

Esnault-Pelterie, 299 U. S. 201, 205–206; *United States* v. *Wells*, 283 U. S. 102, 120–121.

Moreover, even if the court had made such a finding, it could not stand because of lack of evidentiary facts and of any evidence to support it. Finding 11 states (R. 10):

> There is no evidence of an intention to use or of an intention not to use the airport for its heavy bombers after the termination of defendant's lease, other than the fact that defendant has the right to renew its lease only until six months after the end of the present emergency or until June 30, 1967, whichever date is the earlier.

The majority opinion asserted that upon expiration of the lease "defendant no doubt intended to make some arrangement whereby it could use the airport for its military planes whenever it had occasion to do so" (R. 17). Plainly, liability cannot be rested upon such speculation which the court itself admits is not founded upon evidence. And the assumption is contradicted by the fact that the lease terminates six months after the end of the present emergency because, if the intention of permanent use had existed, a permanent arrangement would have been made rather than the temporary lease. As dissenting Judge Madden stated (R. 19), the Government "has been obliged to pay for a permanent right which it does not want and has no expectation of using."

4. The conclusion that "the value of the property destroyed and of the easement taken and the damage to plaintiffs' property resulting from the taking of this easement is the sum of $2,000.00"[3] (R. 18) is likewise unsupported by either evidentiary findings or by evidence. The characterization of the judgment as "in the nature of a jury verdict" makes no difference since a jury's verdict as to value must be within the range of testimony as to value. *United States* v. *685.2 Acres of Land in Lake County, Ill.*, 146 F. 2d 998 (C. C. A. 7).

There being no relevant evidentiary findings, the process the court used to arrive at its figure does not appear. The dissenting opinion indicates that it represented one-half of what the court concluded was fee value (R. 18). But since none of the witnesses testified that the tak-

[3] Plaintiffs' only evidence on this question was that fee value of the property was about $4,700 and that the fair value of loss of the chicken business was $1,000 (R. 25–26, 31–32, 38). This evidence neither indicates the value of the easement nor damages to remaining property resulting from taking of the easement. In rebuttal the Government introduced evidence that the fee value was between $2,500 and $2,885 (R. 81, 96–98, 113–114). The award cannot be justified by taking the difference between the plaintiffs' testimony and the Government's figures, because that difference represented simply the usual variation in expert valuations, and the Government's witnesses testified the airport hazard did not substantially affect market value (R. 89, 101). The court stated (Finding 12; R. 10) that plaintiffs' property "has depreciated in value" but gave no indication as to what evidence it thought supported the statement.

ing of such an easement would diminish the value of the land by one-half, the conclusion was not founded on evidence and cannot support the judgment. Inasmuch as the method of computation of the award is not given, it does not appear whether the award was restricted to the damage caused by Government planes flying over plaintiffs' property or whether it also included damage from planes of others or from Government planes flying over other property. Clearly, the Government is not liable to plaintiff for these latter damages. The fact is that Government traffic represented only about ⅓ of the total traffic at the airfield, that of this ⅓ only 10% represented heavy bombers, to which plaintiffs attributed the damage, and the runway near plaintiffs' property was only used 11% of the time (R. 7–8).

Again, Finding 14 refers to the value of property "that was destroyed" (R. 11). There is no finding that any property was destroyed unless it was the chicken business. In the opinion, the court recognized that plaintiffs are not entitled to recover damage to their business, but said they were entitled to recover "the special value of the land due to its adaptability for use for this business" (R. 18). There was no evidence that this property had a special value for such use. Plaintiffs' experts, rather than relying on such a special use, justified their valuations by reference to sales of neighboring lands (R. 25, 27–28, 30, 31).

They made no mention of a special value for a chicken business.

5. The issues raised by the instant case are of great general importance. The War Department alone administers some 847 airports which are either owned in fee or are operated under leases. Easements or the fee title to property have been acquired only so as to eliminate obstructions which exist within the path of glide computed on an angle of 40 to 1.[4] If the judgment of the court below is correct, rights of flight would have to be obtained extending far beyond the path of glide. The decision would relate likewise to operation by private airlines and airports and if followed elsewhere might vitally affect the development of all aviation operations. Reversal of the judgment would leave the problem to be resolved by measures apart from the concept of a taking of property.

CONCLUSION

The opinion below conflicts with that of the Circuit Court of Appeals for the Ninth Circuit in the *Hinman* case, which we believe to be correct. The questions are of real importance. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

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[4] That is one foot of elevation for each 40 feet of horizontal travel measured from the end of the paved runway. Cf. note 1, p. 4, *supra*.

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